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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 194

ADELINE KIRSCHENMANN,

Petitioner,

vs.

HARRY C. WESTOVER, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE SIXTH DISTRICT OF CALIFORNIA,

Respondent.

HENRY KIRSCHENMANN,

Petitioner,

vs.

HARRY C. WESTOVER, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE SIXTH DISTKICT OF CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above cases on March 8, 1955.

Opinions Below.

The opinion of the District Court for the Southern District of California, Northern Division [R. 70-72] is reported at ..... Fed. Supp. ....., 42 A. F. T. R. 1271. The opinion of the Court of Appeals for the Ninth Circuit [R. 168-172] is reported at ..... F. 2d ....., ... A. F. T. R. ....., 1955 P-H, par. 72,492.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was made and entered on March 8, 1955 [R. 173] and a copy thereof is appended to this petition in the Appendix at pages 1 to 5. A petition for rehearing, filed within the time prescribed by law and rule of Court, was denied by the Court of Appeals for the Ninth Circuit on May 31, 1955 [R. 174]. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Question Presented.

Were payments made in 1944 by appellants to the guardian of their minor child pursuant to an agricultural lease entered into between petitioners and the guardian pursuant to an order of the Court having jurisdiction of the guardianship, deductible by petitioners as rent under Section 23(a)(1)(A) of the Internal Revenue Code, in computing their respective net incomes subject to income tax for said year 1944?

Statutes, Federal Rules and Regulations Invoked.

The following statute is involved herein.

Internal Revenue Code:

Section 23. Deductions From Gross Income.

In computing net income there shall be allowed as deductions:

(a) Expenses—

(1) Trade or Business Expenses—

(A) In General.— * * *; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity * * *.

Treasury Regulations 111, promulgated under the Internal Revenue Code:

Section 29.23(a)-1. Business expenses.—Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, * * *. Among the items included in business expenses are * * * rental for the use of business property.

Statement.

These cases involved federal incomes taxes with interest thereon for the taxable year ended December 31, 1944. The amount involved on each appeal is $9,501.00. Payments thereof were made on March 15, 1944; October 6, 1948, and March 7, 1949 [R. 5, 74]. Separate claims for refund were duly filed by each petitioner [R. 74, 75]. More than six months had elapsed between the date of

filing said claims for refund and the date of filing the complaints in the District Court [R. 10, 28, 30, 75]. Within the time provided in Section 3772 of the Internal Revenue Code, petitioners each brought an action on August 29, 1949, in the District Court for the recovery of the taxes and interest paid [R. 25]. Jurisdiction was conferred on the District Court by Section 1340 of the Judicial Code, as amended (Title 28, U. S. C., Sec. 1340).

These actions were consolidated for trial and disposition [R. 30]. They were submitted to the District Court on a written stipulation of facts, with exhibits attached [R. 30-70] and on oral testimony [R. 91-156]. The facts which were stipulated are as follows:

Petitioners at all times herein material were residents of the County of Kern, State of California, were citizens of the United States of America, and were married and living together [R. 4, 30, 74]. Petitioners duly filed their income tax returns for the taxable year ended December 31, 1944, and each duly paid the tax disclosed thereon in the sum of $33,874.06 to respondent in the manner and at the time required by law. Thereafter a deficiency assessment of income tax for said taxable year was made against each petitioner in the sum of $9,551.49, which amount, together with interest thereon in the sum of $2,040.35, was paid by each petitioner to respondent. The total amount paid by each petitioner to respondent as income tax and interest thereon for said year was the sum of $45,465.90 [R. 5, 30, 74].

On September 19, 1940, Margaret P. Osborne, lessor, leased to petitioner, Henry, lessee, for the term of five years, commencing on November 1, 1941, and ending on October 31, 1946, certain real property located in Kern

County, California [R. 30, 31] pursuant to a written lease, copy of which is attached to the stipulation of facts as Exhibit E [R. 35-40].

On August 25, 1943, petitioners, by written agreement, agreed to purchase said real property from Margaret P. Osborne for the sum of $32,000.00, payable $8,000.00 upon execution of the agreement and $8,000.00 one year, $8,000.00 two years, and $8,000.00 three years after the date of the agreement [R. 31]. A true copy of said agreement is attached to said stipulation as Exhibit F [R. 41-44].

On January 7, 1944, petitioners executed grant deeds on said real property to their daughter, Shirley May Kirschenmann, aged 12 [R. 32]. True copies of said deeds are attached to said stipulation as Exhibit G [R. 44-47].

Thereafter, Edward Kirschenmann was duly appointed guardian of the Estate of Shirley May Kirschenmann in appropriate proceedings in the Superior Court of the State of California, in and for the County of Kern [R. 6, 7, 27, 30].

Thereafter, and under order made by said Superior Court in said proceedings, said guardian executed a lease with petitioner, Henry Kirschenmann, whereby said property so deeded to Shirley May was leased to said petitioner under and by virtue of a written agricultural lease dated February 21, 1944. As rental for the use and occupancy of said land, lessee agreed to pay certain fractions, graduated according to market price of potatoes grown on said property [R. 7, 27, 30]. A true copy of said lease is attached to said stipulation as Exhibit H [R. 47-51].

Said petitioner, as lessee, entered upon said land and farmed the same and harvested potatoes thereon during the said year 1944. Under and by virtue of said lease the rental paid by said lessee was the sum of $19,412.54, which said sum was actually paid by said petitioner, as lessee, to said guardian, and said guardian did actually account to the said Superior Court of Kern County in the said guardianship proceedings for the receipt thereof [R. 7-8, 28, 32].

Each of the petitioners duly filed a gift tax return for the said year 1944, reporting therein the said gift of one-half the value of said property. Said property had a fair market value of $32,000.00 at the date of said gifts [R. 6, 27, 33].

Said guardian paid the sum of $24,000.00, together with interest thereon, from the assets of Shirley May's guardianship estate in accordance with the terms of said Exhibit F as the unpaid balance of the purchase price of said property [R. 32-33].

In the preparation of their respective income tax returns and the determination of their respective income tax liability for said taxable year 1944, each petitioner claimed one-half of said sum of $19,412.54, or the sum of $9,706.27, as a deduction from business income. The Commissioner of Internal Revenue disallowed said deduction and redetermined petitioners' respective income tax liability for said year. By reason of said redetermination of said tax liability, each petitioner paid an additional income tax for said year in the sum of $9,551.49 and interest thereon in the sum of $2,040.35 [R. 8, 9, 28, 30].

Thereafter, and within the time prescribed by law, each petitioner duly made and filed a written claim for refund

of income tax in the amount of $9,168.61, alleging as a basis of said claim the same grounds as stated in their respective complaints, to wit, the disallowance of said deduction for rental paid [R. 9, 10, 28, 30]. A true copy of said claim is attached to said complaint as Exhibit C [R. 11-16]. More than six months had elapsed since the date of filing said claims and the bringing of the within actions [R. 10, 28, 30].

All of the above-mentioned exhibits were introduced into evidence [R. 34].

In addition to the stipulated facts, uncontradicted testimony of witnesses called on behalf of petitioners, established the following facts:

The transfer of the property by petitioners to their daughter was a gift and so intended [R. 96]; that petitioners, or either of them, received no part of the rental in the sum of $19,412.54, nor was any portion thereof ever used to purchase anything for them or for either of them, nor did they, or either of them, ever exercise any control over any portion of it, nor did they, or either of them, ever have any of it in their possession after payment thereof to said guardian as rental [R. 97, 137, 138].

The lease between Margaret P. Osborne and Henry Kirschenmann was a development lease, which required the expenditure of large sums to develop the land into usable farming land [R. 97, 146, 147].

There was no determination prior to or at the time of the transfer of said property by petitioners as to the use to which it would be put, that is, whether it would be farmed by the guardian, leased to a third person, or leased to petitioner donor Henry Kirschenmann [R. 126-128].

The rental provided in the lease to be paid was in accordance with share crop leases generally used in the same area as here involved, and was consistent with the rental charged by Kern County Land Company in share-crop leases [R. 98, 99, 115, 116, 144-146, 149, 152, 156].

The sole purpose of the transfer of said property by petitioners to their daughter was to provide her with an estate of her own so that she would be assured of an education in the event petitioners should suffer reverses from their farming operations. The tax consequences of the transfer were not discussed except that petitioner, Henry Kirschenmann, was advised by his attorney that the income to be derived from the property would be taxable to petitioners' daughter [R. 99, 135, 136].

Reasons for Granting the Writ.

The decision below should be reviewed because it is in direct conflict with the decisions of the Courts of Appeal in the Third and Seventh Circuits, viz., *Brown v. Commissioner*, 180 F. 2d 926 (C. C. A. 3, 1950), cert. den., Oct. 9, 1950, 340 U. S. 814, 71 S. Ct. 42, and *Skemp v. Commissioner*, 168 F. 2d 598 (C. C. A. 7, 1948).

(1) In *Skemp v. Commissioner, supra*, taxpayer owned a building, in a part of which he maintained his medical clinic and the rest of which was arranged for rental to others for general office purposes. He created a trust for a term of twenty years for the benefit of his wife and chiddren and conveyed the building to a trust company as sole trustee. Taxpayer reserved the right to rent all or a part of the building at a rental to be determined by the trustee.

On the same day as the creation of the trust, the trustee and taxpayer entered into a lease of the entire building for a term of ten years. Taxpayer paid the rent according to the lease. Taxpayer deducted the rental paid in his income tax return. The Commissioner disallowed the deduction, and the Tax Court sustained the Commissioner (8 T. C. 415). In reversing the Tax Court, the United States Court of Appeals as did the Tax Court (8 T. C. 420), said at page 599:

> "The issue before us is the narrow one of deduction and does not involve the taxability of the trust income under *Helvering v. Clifford,* 309 U. S. 331, 60 S. Ct. 554, 84 L. Ed. 788."

The Court then quotes Section 23(a)(1)(A) of the Internal Revenue Code relating to the deduction of rental payments.

The Court then says at page 599:

> "Payments of rent are thus specifically included in the statute as deductions. Unless we are to impute to the trustee a violation of its fiduciary duty, the taxpayer is 'required' to pay these monthly sums —they are a legal and collectible obligation. Without further imputing such violation to the trustee, we cannot say that the taxpayer must not pay them 'as a condition to the continued use or possession.'"

And on page 600, the Court continues:

> "In this case we have a valid, irrevocable trust, wholly divesting the taxpayer of any interest in the trust property, and an agreement by the taxpayer to pay the trustee a reasonable rental under a valid lease. The income from the property is not claimed in this proceeding to be that of the taxpayer. We have here only a question of deduction of rental from gross in-

come. There can be no question but what rent required to be paid is properly deductible. The trustee was duty bound to exact rent of the taxpayer and the taxpayer was legally bound to pay it, just as much as if the taxpayer had moved across the street into the property of a third party. No one doubts that he would have had to pay rent then, and would have been entitled to deduct it even though he had voluntarily created that situation. We are not impressed with the argument of the Government that the taxpayer voluntarily created the present situation.

"Nor can we agree with the Commissioner's contention that there was no change in the taxpayer's economic status. He had irrevocably divested himself of all title and rights to the property and could occupy it only upon payment of rent, the amount of which was to be fixed by the trustee."

(2) In *Brown v. Commissioner, supra,* a case in which the facts are strikingly analogous to the facts in the instant case, the taxpayers, husband and wife, were partners engaged in the general contracting and coal mining business. In 1943 they purchased two tracts of land, on one of which was located a railroad siding for loading coal, which they had used on a per car fee basis. The other tract was coal land which taxpayers intended to mine. Shortly after the purchase of the two tracts of land, taxpayers discussed with their attorneys the matter of the future financial security of their two sons, one aged about two years, and the other about six months. A trust was suggested whereby the two tracts would be transferred to one of their attorneys as trustee, "with the understanding that the properties were to be leased to the taxpayers, who were, as always intended, to continue to operate them under their partnership agreement." Accordingly, the trusts were

executed and on the following day the trustee leased the two properties to the taxpayers. In 1944, taxpayers paid an aggregate of $20,482.28 as rental and royalties for the use of the two properties. Taxpayers claimed said rentals and royalties as a deduction on their partnership return for said year 1944. The Commissioner disallowed the deduction. The Tax Court sustained the Commissioner (12 T. C. 1095).

In reversing the Tax Court, the United States Court of Appeals said at page 929:

> "By the trust agreements the taxpayers conveyed to an independent trustee title to the land upon which the siding was located and the coal land. The trustee then leased them back to the taxpayers upon what were found by the Tax Court to be reasonable rents and royalties. It is true that this was done pursuant to a prior understanding between the taxpayers and the prospective trustee but we do not regard this point as significant. What is controlling is that there came into the picture a new independent owner, the trustee, who was in a position to and did require the payment of the rents and royalties as a condition to the continued use and possession of the lands by the taxpayers for the purposes of their business and wholly without regard to whether their operations resulted in taxable income.
>
> "The taxpayers were legally obligated to pay the rents and royalties for the use of the siding and the mining of the coal even though their operations had resulted in a loss. The deduction of these rents and royalties was authorized by the express language of Section 23(a)(1)(A) of the Internal Revenue Code."

The Court then quotes with approval from *Skemp v. Commissioner, supra,* pages 599, 600.

(3) Paraphrasing the *Skemp* and *Brown* cases, *supra;* hereto a new, independent owner, namely, Shirley May Kirschenmann, came into the picture. Since she was a minor, a guardian was appointed to act for her under the direction and control of a court of competent jurisdiction. She thus became a ward of the court. *Fox v. Minor,* 32 Cal. 111 (1867). Certainly, we are not to impute to the Court a violation of its duty—it is stipulated that the guardian executed the lease under order of the Court [R. 7, par. VIII; 27, par. VIII; 30, par. V]. The trial court found as a fact that the lease and the share-crop rental therein provided were in conformity with share-crop leases then in general use in Kern County, the county in which the property was located [R. 76]. Hence, the rental was reasonable.

Here, too, the rental was payable even though petitioners' farming operations had resulted in a loss.

Here also the guardian, under the supervision and authority of the Court, was in a position and duty bound under the law to, and did, require the payment of the rents "as a condition to the continued use and possession of the lands by the taxpayers for the purposes of their business, and wholly without regard to whether their operations resulted in taxable income."

The gift made by petitioners to their daughter was wholly and completely unconditional and unfettered. The guardian or the Court, acting, independently, could have refused to lease the property to petitioners, could have caused it to be otherwise farmed or used or could have sold it and reinvested the proceeds [R. 126-128].

Resch v. Commissioner, 20 T. C. 21.

(4) The Court below states that the *Brown* and *Skemp* cases, *supra,* do not support petitioner's position because in the cited cases the rent paid was held not to be unreasonable, while in the instant cases, no such finding was made [R. 170]. This statement ignores Finding of Fact XV [R. 76] that "The lease and the share crop rental therein provided for was in conformity with share crop leases then in general use in Kern County," the county in which the subject property was located. It would seem to follow that if the rent paid is in conformity with rent paid generally in the same locale, such rent must of necessity be reasonable, else all rental in such locale would be unreasonable. Hence, there was a finding made that the rent paid was reasonable. Regulation 118, Section 39.23(a)(6), states "It is in general just to assume that reasonable and true compensation is only such amount as would ordinarily be paid for like services by like enterprises under like circumstances." In other words, compensation is reasonable if it is in conformity with compensation paid generally for like services. It would follow, it is submitted, that the same rule is applicable to rent—if rent paid is in conformity with rent paid generally in the same locale, it must be reasonable.

(5) The Court below [R. 170] compared the 1940 Osborne lease with the 1944 Shirley May lease, without noting the difference between the leases. The Osborne lease was a development lease—one of raw land which must be developed by the lessee at substantial costs before the property can be farmed. The Shirley May lease was an agricultural lease, one of improved and developed land ready to farm. The rental of a development lease is less than of an agricultural lease. Rental values were higher

in 1944 than in 1940 due in part to the higher value of potatoes in 1944 than in 1940. The amount paid as rent under the Shirley May lease in 1944 was the result of a good crop and a high market value for potatoes [Ex. H, R. 47-51, 97, 98, 106, 110, 115, 117, 139-142, 146-147].

(6) The statement [R. 170] of the Court below that the disparity in the two rentals was the result of a studied attempt to gain a tax advantage is contrary to and beyond the record and substitutes the Court's conclusion for the clear and uncontradicted testimony to the contrary [R. 99, 101, 135-136]. It is error for a court not to follow uncontradicted testimony.

> *Grace Bros. Inc. v. Commissioner*, 173 F. 2d 170, 174 (C. C. A. 9, 1949).

(7) Tax motives, however relevant they may be in determining whether the transaction was real or a sham, cannot change the transaction if it is carried out bona fide. *United States v. Cumberland Public Service Co.*, 338 U. S. 451, 70 S. Ct. 280 (1950), and the Court below recognized that petitioners divested themselves of title to the property [R. 170], yet refused to give any recognition to the lease by which they *regained* possession under the requirement of paying the rental called for in the lease.

(8) The Court's statement [R. 171] that "what is found here lacks business meaning for tax purposes" appears meaningless—because "what is found here" is a valid gift which requires no business meaning or purpose.

(9) The concurring opinion is contrary to the real property law of the State of California. The grant deeds from petitioners to their daughter [R. 44-47] tranferred *all* of their right, title and interest in and to the property and were expressly made subject to the balance of the purchase price.

A grant deed is a conveyance (Civ. Code, Sec. 1092); the transfer of a thing transfers all its incidents (Civ. Code, Sec. 1084); where a person purports by proper instrument to grant real property in fee simple, and subsequently acquires any title or claim of title thereto, the same passes by operation of law to the grantee, or his successors (Civ. Code, Sec. 1106); and in California no deficiency judgment lies for the unpaid balance of the purchase price under a contract of sale (Civ. Code, Sec. 580b). The real property law of California controls with respect to what title passed.

Blair v. Commissioner, 300 U. S. 5, 57 S. Ct. 330.

Petitioners, under California law, thus passed every incident of title which they held and the after acquired fee passed automatically to Shirley May by operation of law.

(10) From the foregoing it appears that the instant case is on "all fours" with the *Brown* and *Skemp* cases, *supra,* and the decision of the Court below is in direct conflict with the decisions in the cited cases.

Conclusion.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Counsel for Petitioners.

APPENDIX.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Adeline Kirschenmann, appellant, vs. Harry C. Westover, United States Collector of Internal Revenue for the Sixth District of California, Appellee.

Henry Kirschenmann, appellant, vs. Harry C. Westover, United States Collector of Internal Revenue for the Sixth District of California, appellee. No. 13,736.

March 8, 1955.

Appeals from the United States District Court for the Southern District of California, Central Division.

Before STEPHENS and FEE, Circuit Judges, and LING, District Judge.

LING, District Judge:

Taxpayers are husband and wife. In 1944, the taxable year here in question, and prior thereto, the husband was engaged in farming operations in Kern County, California. Part of the land used in this operation was a quarter section leased from one Margaret P. Osborne, under lease dated September 19, 1940. The lease was for five years, commencing November 1, 1941, at a total rental of $4550. Of this amount $700 was payable each year for the first two years and $1050 each remaining year. During the life of the lease, on August 25, 1943, taxpayers agreed with the lessor-owner to purchase the

property for a down payment of $8000 and a like amount each year for three years thereafter.

On January 9, 1944, without valuable consideration, taxpayers conveyed their interest in the property to their minor daughter. Prior to this transaction they had discussed with their attorney the incident tax consequences. On February 7, 1944, Edward Kirschenmann, a brother of taxpayer, Henry Kirschenmann, was legally appointed guardian of the daughter's estate. Two weeks later the guardian leased the property back to taxpayers for a five year term, commencing July, 1944. The lease was a share-crop agreement, under the terms of which in the Fall of 1944 taxpayers paid the guardian $19,412.54 as rental for that year.[1] This represented a substantial part of the amount realized from farming the land. The child

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[1]Following are excerpts from the testimony of Henry Kirshenmann:

"Q. Then this lease which you made, which you entered into as lessee from your brother Edward in 1944, was the only lease you have entered into, or entered into in this period on a share-crop basis, is that correct? A. That is right.

* * * * *

"The Court: Did you have any other similar lease on property where you were raising potatoes—

"The Witness: No.

"Q. (By Mr. McHale): Have you ever had any since?

"The Court: That is all the rest of them were cash leases?

"The Witness: Yes, sir.

"The Court: Go ahead.

"Q. (By Mr. McHale): Have you ever had any since similar to this? A. No.

* * * * *

"Q. Could you give us an estimate of the number of acres you were farming in and about that period (1942-3-4), Mr. Kirschenmann? A. Oh, I was farming between 700 and a thousand acres of potatoes through the year."

took no part in the farming operation and her parents exercised the same control over the property as before; community assets, credit and effort being used in the farming operation. The balance of $24,000 due under the purchase agreement was paid by the guardian with funds from his ward's estate.

Parenthetically it may be added, that in December 1943, Edward Kirschenmann conveyed a quarter section of land to his children and his brother Henry was appointed guardian of their estates. As here, a share-crop lease was given the parents. All parties to both transactions were represented by the same attorney.

Taxpayers deducted from their 1944 gross community income the amount of $19,412.54 as rental paid. The question for determination is whether this amount was paid as a condition to the continued use of the property for the purposes of their business.[2] The District Court held against taxpayers.

It is contended that Skemp v. Commissioner, 168 F. 2d 598, and Brown v. Commissioner, 180 F. 2d 926, support

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[2]SEC. 23. DEDUCTIONS FROM GROSS INCOME.

"In computing net income there shall be allowed as deductions:

(a) (as amended by Sec. 121(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798) Expenses.—

(1) Trade or Business Expenses.—

(A) In General.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including * * * rentals or other payments required to be made as a condtiion to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity."

* * * * * * * * * *

(26 U. S. C. 1946 ed., Sec. 23.)

taxpayers' position. We cannot agree. In both of these cases it was held that the rent paid was not unreasonable. Here no like finding was made, nor could such conclusion find support on the record. Taxpayers by the terms of their lease with Mrs. Osborne were obligated to pay only $1050 for the year in question; instead, by their own contrivance, they elected to pay $19,412.54. To say in this situation that such disparity was not the result of a studied attempt to gain a tax advantage would indicate a blindness to reality. It is true, taxpayers divested themselves of title to the property, yet they farmed the land as before, and in effect it was their earning power which formed the basis for the entire transaction, including payment of the purchase price. Tax consequences are determined not from the formal aspect of a transaction, but from the actual substance of a piece of business. What is found here lacks business meaning for tax purposes. This court's decision in Shaffer Terminals, Inc. v. Commissioner, 194 F. 2d 539, is controlling.

The instant case involved another issue which was resolved against taxpayers in the District Court. Originally, the Court's ruling on this disputed point was challenged here. However, it now appears that, while this appeal was pending, the parties stipulated that the judgment of the District Court on the question was correct. We have not therefore considered the matter.

Affirmed.

JAMES ALGER FEE, concurring:

The majority opinion is correct and sound. However, clarification may assist.

The statute provides that there should be allowed as deductions "rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity." Section 23(a)(1)(A), Internal Revenue Code. Unless taxpayers here had made a transfer of their entire equity, no deduction would be allowable under this section. The deed to their daughter did not convey the fee because they did not own the fee. After the transfer of some interest to their daughter, taxpayers, not their daughter or her guardian, were bound to pay the balance of the purchase price and were still the owners of an equity in the parcel until this was paid. If there had been a default, they would have been the defendants, since they were in possession and were the vendees. After the purchase price had been paid in full, title to the parcel was taken in taxpayers' names.

Taxpayers are not entitled to the deduction claimed here, since they have failed to show that the payments were made for the use of "property to which the taxpayer has not taken or is not taking title or in which he has no equity." Besides, the payments of the so-called "rental" were not and could not have been made to the daughter or her guardian under the circumstances "as a condition to the continued use or possession" of the property.

(Endorsed): Opinion and Concurring Opinion. Filed Mar. 8, 1955. Paul P. O'Brien, Clerk.